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No. 817

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

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VITO GENOVESE, *Petitioner*

v.

UNITED STATES OF AMERICA

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## PETITIONER'S REPLY

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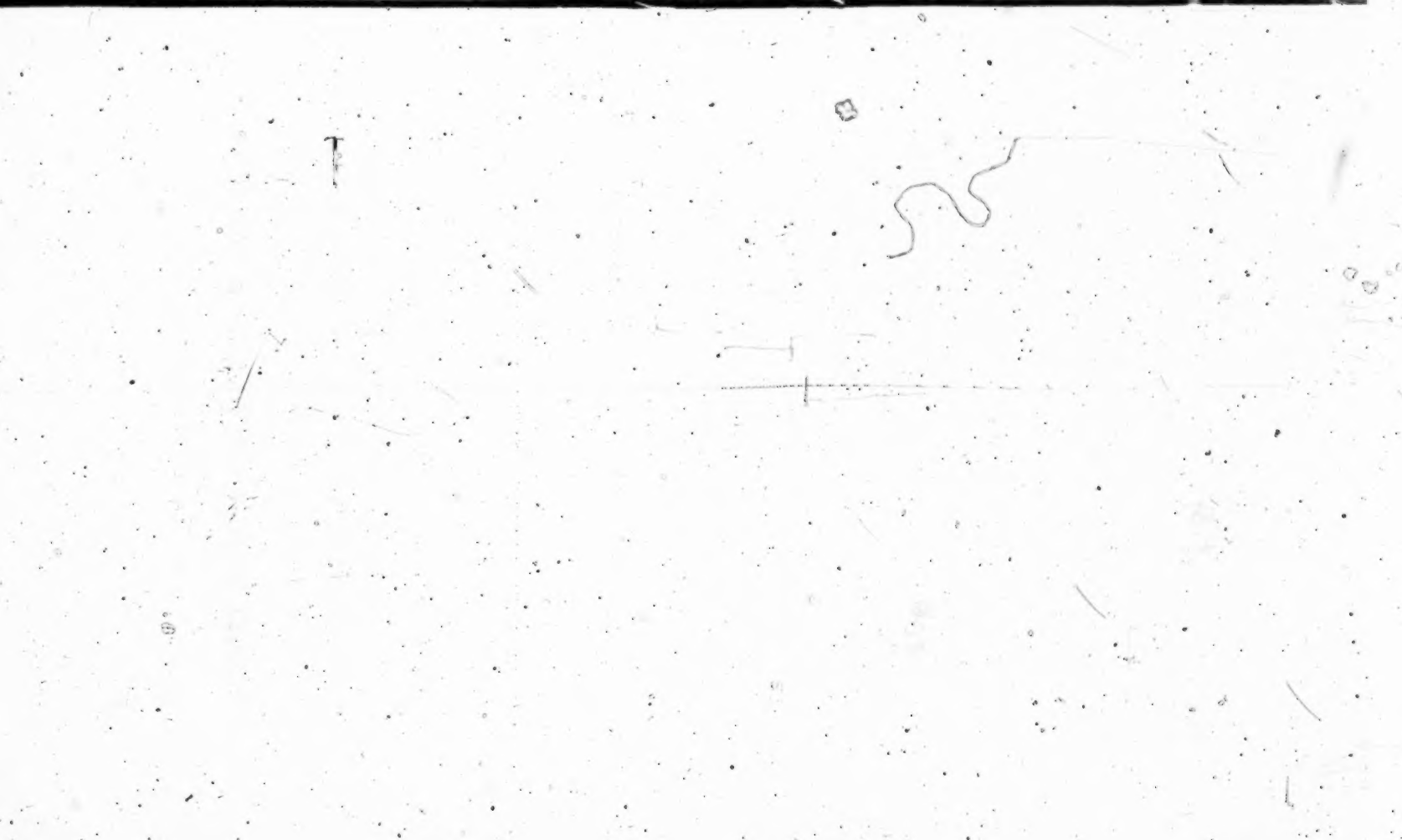
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Several matters are submitted in reply, following the same order as in the Petition.

### I

The first question presented by the Petition (pages 2, 30-34) is whether petitioner Genovese's right to a fair trial was violated by the severely prejudicial publicity which occurred before and during the trial; and whether any of the numerous requests for relief on that account should have been granted. As to this fundamental question the Brief in Opposition (pages 52-53) does not deny that the publicity both before the trial

and during the trial was of a severely adverse nature, containing many prejudicial items which could not properly have been placed before the jury as evidence in open court. "Had they been offered as evidence in court they would not have been admissible". *Coppedge v. United States,* 272 F. 2d 504, 508 (D.C. Cir. 1959).

The Brief in Opposition (pages 52-53) systematically ignores all the points of difficulty for the Government's position. For example, the Brief in Opposition does not deny—and does not comment on—the important role of the then United States Attorney in generating some of the severely prejudicial publicity which occurred before the trial.

Instead, the Brief in Opposition (page 53) advances an assertion, not established or supported by the record, that in this present case "the jurors never read any of the prejudicial publicity". As to the prejudicial publicity during the trial, the Brief in Opposition (page 52) further says "on February 16 and 17, 1959, in response to questioning, the jurors indicated that they did not read any articles concerning the case (Tr. 2705, 2861)." But as has been shown by the Petition (see page 16 and note on pages A-35 and A-36), in both of these two instances, which occurred about half way through the trial, the trial court's question to the jurors was confined to asking whether the jurors had read any article "since we last recessed"—thus covering merely several days[1] in the course of a three-month trial during which the barrage of prejudicial publicity was a continuing phenomenon.

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[1] The trial was in session on February 11, and then recessed until Monday, February 16 (App. 31a; Tr. 2693-A).

The Brief in Opposition (pages 52-53) likewise seeks some support from a contention that "Two days before the case was submitted to the jury, petitioners refused the Court's offer to inquire of the jury again (Tr. 6681)." This is a transcript reference to a colloquy which occurred during the course of the summations, and was occasioned by the appearance of certain prejudicial newspaper articles just as the trial was ending. Inspection of the record (Tr. 6680-6683; App. 1030a-1032a) will show that the Government's characterization of the transcript is inaccurate; contrary to the Government's claim, the defendants did not then "refuse the Court's offer to inquire of the jury again". In any event, by the time this occurred the prejudice to petitioner was irreparable, and could hardly have been cured by interrogation of the jury.

As was stated by the Court of Appeals in *Briggs* v. *United States*, 221 F. 2d 636, 639 (6th Cir. 1955), on which the Petition (page 32) relies:

> "Although there was no direct evidence in this case that the newspaper articles were read by any juror, it is obvious that one or more of the jurors probably did. In this connection the following statement from the opinion in Meyer v. Cadwalader, supra [49 F. 36], is much in point. 'It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it.' . . .

"The Government contends that any prejudice that might have resulted to the appellant was waived by him when the trial judge asked his counsel if he wanted the Court to question the jurors as to whether they read the articles and as to whether it might have prejudiced them in the case, to which counsel replied that he did not believe that 'that would be compatible to the proper interest of the defendant.' The trial judge thereupon overruled the motion for a mistrial and proceeded with the evidence.

"Any prejudice to the appellant that existed at that time was not caused by any act of the appellant. It could very well be that questioning the jury would be more prejudicial than helpful. We do not believe that appellant was required to agree to such questioning in order to preserve his contention that the appellant was entitled to a mistrial. . . ."

## II

The Petition (pages 34-39) has presented the strong reasons for an examination by this Court, in this case, of the question whether in the federal courts a conviction can be based solely on accomplice testimony in the total absence of corroboration connecting the defendant with the offense. To this the Government's only answer is (Brief in Opposition, pages 27-28): "There is no occasion to consider petitioner Genovese's claim (Pet. No. 817, 34-39) that this Court should reexamine the rule in the federal courts that corroboration of an accomplice's testimony is not required, for Cantellops, although not corroborated as to Genovese, was directly or circumstantially corroborated on so many material particulars that the claim must fall for want of a predicate."

Thus the Government acknowledges—as it must on this record—that Cantellops' testimony had absolutely no corroboration connecting Genovese with the alleged offense. The Government then says this does not matter, because there was some corroboration of other portions of Cantellops' testimony.

But as the Petition makes clear, the rule which petitioner urges that this Court should enforce in the federal courts is the salutary rule which is carefully followed in a large number of the States—namely, that an accomplice's testimony must be supported by corroboration which actually connects the particular defendant with the offense. It is not, as the Government seems to assume, a rule that there be merely corroboration in some other respects, but not tending to connect the particular defendant with the offense.

The Petition (page 35) cited typical authorities from six of the States by way of illustration; the full list of States enforcing a similar requirement of corroboration is much larger. Examination of the illustrative decisions cited from those six States, and of the statutes (many of them of long standing) on which some of them rest, shows how firm is the requirement that the corroboration must tend to connect the particular defendant with the commission of the offense. Thus the California decisions, of which *People* v. *Wallin*, 32 Cal. 2d 803, 808-809, 197 P. 2d 734, 737 (1948), is typical, compare *People* v. *MacEwing*, 45 Cal. 2d 218, 223-225, 288 P. 2d 257, 260-261 (1955), embody the application of Section 1111 of the California Penal Code, which provides:

> "A conviction can not be had upon the testimony of an accomplice unless it is corroborated by such other evidence as shall tend to connect the defend-

ant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

The Minnesota decisions, of which *State* v. *McLaughlin*, 250 Minn. 309, 84 N.W. 2d 664 (1957), is typical, involve the application of the almost identical Section 634.04 of Minnesota Statutes Annotated. The Minnesota court in *McLaughlin* states (250 Minn. at 319-320, 84 N.W. 2d at 672) that "the corroboration must tend to convict the person charged, and it is not enough if it merely shows the commission of the offense or the circumstances thereof", and that "The requirement of § 634.04 that the testimony of an accomplice in crime must find support in and be bolstered by other corroborative evidence is based upon the theory that such testimony has been given by one admittedly corrupt and that it is likely to have been submitted in the hope of clemency."

Similarly, the New York rule applied in *People* v. *Malizia*, 4 N.Y. 2d 22, 148 N.E. 2d 897 (1958), rests on New York Code of Criminal Procedure, Section 399, unchanged since 1882, providing that "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." And the Texas rule invoked in *Goodwin* v. *State*, 307 S.W. 2d 264 (Tex. Cr. App. 1957), applies the comparable Article 718, Texas Code of Criminal Procedure.

Similar provisions will be found in other States which have a statutory basis for their corroboration requirement. In most of these States, corroboration

which does not tend to connect the particular defendant with the offense will not suffice.

Similar results obtain in the two States, Maryland and Tennessee, which were cited (Petition, page 35) as enforcing the corroboration rule without the aid of statute. The reasons for Maryland's policy were set forth in *Watson* v. *State*, 208 Md. 210, 217, 117 A. 2d 549, 552 (1955):

> "It is a firmly established rule in this State that a person accused of crime may not be convicted on the uncorroborated testimony of an accomplice. [citing cases] The reason for the rule requiring the testimony of an accomplice to be corroborated is that it is the testimony of a person admittedly contaminated with guilt, who admits his participation in the crime for which he particularly blames the defendant, and it should be regarded with great suspicion and caution, because otherwise the life or liberty of an innocent person might be taken away by a witness who makes the accusation either to gratify his malice or to shield himself from punishment, or in the hope of receiving clemency by turning State's evidence. [citing cases]"

And in *Wright* v. *State*, 219 Md. 643, 650, 150 A. 2d 733, 737 (1959), which reaffirms Maryland's corroboration requirement, the court said that "the corroborative evidence must support the testimony of the accomplice as to some of the material facts tending to show that the accused was either identified with the perpetrators of the crime or had participated in the commission of the crime itself." The Tennessee case cited (Petition, page 35), *Witham* v. *State*, 191 Tenn. 115, 122, 232 S.W. 2d 3, 6 (1950), refers back to two earlier Tennessee decisions which define the degree of corrobora-

tion required in that jurisdiction as "some other evidence fairly tending to connect the defendant with the commission of the crime, so that his conviction will not rest entirely upon the evidence of the accomplice." *Clapp* v. *State*, 94 Tenn. 186, 195, 30 S.W. 214, 217 (1895); *Stanley* v. *State*, 189 Tenn. 110, 115-116, 222 S.W. 2d 384, 386 (1949).

The record in this case squarely presents the question whether such a rule, requiring corroboration actually connecting the particular defendant with the offense, should be the rule enforced in the federal courts. For the reasons stated, this is a question of widespread significance, which warrants review by this Court. The Government nowhere disputes that it is an important and recurring question. The record in the present case brings to the Court an unusually compelling situation for such a review to be made, and in any event, for applying such a rule in the exceptional circumstances of this case as described in the Petition.

## III

As to the "Jencks" issues (Petition, pages 26-29, 39-41), the Brief in Opposition (page 43) argues: "Actually, petitioner was given all that was due him under 18 U.S.C. 3500". But that is a question on which, as the Petition shows, petitioner is seeking to have the trial court's *in camera* determination subjected to some appellate review, as contemplated both by the statute and by orderly judicial procedure. The Petition has made evident that there appears to have been a complete absence of appellate review of whether the trial judge's rulings were unduly restrictive.

The Brief in Opposition (page 43) seeks to justify this anomalous situation by arguing: "Since neither

the petitioner nor his codefendants raised this issue in the court below, petitioner's argument falls with his predicate." First, as to at least two important reports by Agent Enright, the issue was raised sufficiently expressly in the Court of Appeals. Portions of the Enright report of April 14, 1958 and all of the Enright reports of May 5 and June 30, 1958, were withheld by the trial judge from the defense (see Petition, pages 25-27). Petitioner's Brief in the Court of Appeals (pages 26-28; see also pages 10-12 thereof), referring to Cantellops' much controverted changes in testimony in Cantellops' successive grand jury appearances, expressly complained of the action taken when the trial court "impounded the above reports [the two Enright reports of April 14 and May 5, 1958] and marked them as Court exhibits without permitting appellant to inspect them"; and also argued that the suppression of those two reports had restricted what the defense on cross-examination of Cantellops could develop as to the circumstances surrounding Cantellops' return to the grand jury. The point was reiterated in forceful detail in petitioner's Petition for Rehearing in the Court of Appeals (pages 2-9).[2] Since Cantellops was the prosecution's principal witness on whom the whole case turned,[3] certainly petitioner is entitled to have appel-

[2] The Petition for Rehearing is set forth in Vol. IV, pages 1-18, of Certified Record of Proceedings in the Court of Appeals. A copy of petitioner's Brief in the Court of Appeals has been lodged with the Clerk.

[3] In connection with the question of denial of access to reports containing pre-trial statements of Cantellops, the Brief in Opposition also contains a minor error which should be corrected. The Brief in Opposition says (page 43, note 25) that "Petitioner misstates the record when he asserts (Pet. No. 817, 27-28) that the trial judge 'refused to make available to the defense' six of Consoli's reports, Enright's April 14, 1958 report and Muglia's

late review of the question whether under applicable principles of law the impounded Enright reports contained material which was not, but should have been, disclosed to defense counsel. The appellate court, but not petitioner's counsel, had access to the contents of the sealed exhibits; and as pointed out in the Petition, there is no way of knowing whether the Court of Appeals has even looked at the contents of the reports unless the Court of Appeals so states in its opinion or order. Thus at the very least, as to two important Enright reports, there has been a serious failure of the appellate process of function properly.

As to the other impounded reports, even though questions as to them may not have been specifically brought to the attention of the Court of Appeals, the sealed exhibits themselves were there for appellate review and proper exercise of appellate responsibilities called for an examination of those reports too by the Court of Appeals. In any event, in view of the nature of the case, the thinness of the supposed evidence against petitioner Genovese and its entire dependence on the testimony of the Government's principal witness Cantellops, the central importance of the issues concerning Cantellops' credibility and Cantellops' various succes-

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two reports." Inspection of the Petition will show it was stated there (and correctly so) that the trial judge refused to make available "certain portions" of those reports. The question presented is whether, as to those portions which were not made available, the trial judge's ruling, after his *in camera* examination and the voir dire, was unduly restrictive—that is, whether all or part of the withheld reports and withheld portions of reports should have been made available; and whether the Court of Appeals has failed to give—and to show that it has given—proper appellate review to that matter.

sive changes in his story,[4] and the other exceptional circumstances affecting the fairness of the trial, it is in the interest of justice that all appellate review of this matter should not be dispensed with. Compare *United Brotherhood, C. & J. v. United States*, 330 U.S. 395, 411-412.

The Petition (page 26, note 8) noted that, apart from statements by the witness Cantellops, there were also

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[4] The Petition (pages 21-22) pointed out that on March 18, 1958—less than four months before this indictment was found though long after Cantellops had become "cooperative"—Cantellops testified before the grand jury to the effect that he had never talked to Genovese and had only seen Genovese once and that by chance. At the trial Cantellops gave contrary testimony. The Brief in Opposition (pages 21-22) says: "Cantellops explained his 'misstatements' as to Gigante and Genovese to the grand jury as follows (G.J. 290-291)", and then it quotes a long passage from Cantellops' June 25, 1958 grand jury testimony, in which Cantellops testified he had now decided to "go ahead and help to the full extent, even knowing the risk that is involved". The quoted passage was not offered in evidence at the trial; the Government, however, has now lodged with the Clerk of this Court the minutes of Cantellops' testimony before the grand jury (see Brief in Opposition, page 3, note 1). In any event, the Brief in Opposition is inaccurate in suggesting that the quoted "explanation" was put forward by Cantellops as an "explanation" of his change in testimony concerning Genovese. Actually, after making the statement quoted by the Brief in Opposition, Cantellops in the entire remainder of this June 25, 1958 grand jury testimony, then proceeded to deal with Cantellops' alleged trip to Cleveland with Gigante, and various other matters (G.J. 291-300), without a single reference whatsoever being made by Cantellops to Genovese; and Cantellops was then excused as a witness (G.J. 300). Not until five days later, on June 30, 1958, when Cantellops was once more recalled to testify again before the grand jury (G.J. 301), did Cantellops for the first time allege to the grand jury that Genovese had any connection with this alleged narcotics conspiracy; and his grand jury testimony on that date does not show any "explanation" by Cantellops as to this last-minute change (G.J. 301-312).

certain other Government witnesses as to whom there had been no appellate review of whether portions of their statements had been improperly withheld from defense counsel. Items withheld included three portions of Agent Schrier's case report concerning this alleged narcotics conspiracy. Schrier was a Federal Bureau of Narcotics agent, who testified as a Government witness (Tr. 628-751);[5] the three withheld portions of his case report were marked for identification as sealed Court Exhibit Q-1 after the prosecution suggested this should be done "for possible appellate review" (Tr. 775-776). As noted in the Petition, there is no indication that any appellate review has been given to such questions by the Court of Appeals. In any event, the Government's Brief filed in this Court on April 4, 1960, in No. 278, *Needelman* v. *United States*—recently argued and now awaiting decision—has made a concession as to interpretation of the Jencks Act, which has a bearing on this aspect of the present case. For in its *Needelman* Brief (page 12, see also page 20) the Government has conceded: "In our view, when an agent makes a report to his superiors or fellow agents of what he sees or hears, he makes a communication to an agent of the government, and his recital is within the reach of 18 U.S.C. 3500 if he becomes a government witness". Though counsel do not know the contents of the three withheld portions of Agent Schrier's case report, this would indicate that—even if the Government should ultimately prevail in *Needelman* on its argument that uncommunicated notes of a Government agent are not "statements" of the agent and are not required to be produced after the agent has become a

[5] Agent Schrier's testimony, while not in any way implicating Genovese, was an important segment in the prosecution's effort to prove the existence of the alleged conspiracy.

Government witness—nevertheless the withheld portions of agent Schrier's case report should not have been withheld here. And at the very least, this matter should be given some appellate review.

## IV

The Petition (pages 43-45) showed how the prosecutor in his summation had helped to deprive the defendants of a fair trial, as to a most vital aspect of Cantellops' credibility, by telling the jury that once Cantellops had been sentenced in the New York State court "nobody could get him off of that"; and accordingly that Cantellops could have no motive "to come in here and make up a story"—whereas in fact, shortly after the trial, and "at the request of the United States Attorney" the Governor of New York did commute Cantellops' minimum sentence so that Cantellops could be released on parole. The Petition urged that the prosecutor, when he made this argument to the jury, must have known that there existed the definite possibility of executive action to reduce Cantellops' sentence; and that the prosecutor nevertheless had effectively diverted the jury from considering this factor when making their assessment of Cantellops' motives and credibility.

The Brief in Opposition (pages 51-52) asserts that "The closing argument of the United States Attorney, when read in context, does not carry the implications petitioners place on it." But the context makes it abundantly clear that this is exactly what the prosecutor told the jury; the "implications" were placed there by the prosecutor himself.

## V

As additional grounds for vacating the conviction, the Petition (pages 47-50 and Appendix D) set forth the substance of certain information recently furnished to the Government concerning unreliability and perjuriousness of Cantellops' trial testimony. The items related to (1) a major recantation by Cantellops, which occurred on January 27, 1960, of testimony Cantellops had given at this trial; and (2) independent new evidence in refutation of important segments of Cantellops' trial testimony—particularly in refutation of Cantellops' trial testimony concerning the Las Vegas matter which, as has been shown (Petition, pages D-6 through D-19), played a most significant role at the trial.

As to Cantellops' recantation, the Solicitor General states in the Brief in Opposition (page 55) that "the partial recantation relied upon has been repudiated by Cantellops as the product of duress and bribery".[6]

The Solicitor General having furnished information that Cantellops has repudiated the recantation, it would now appear that, before determining whether the Cantellops' recantation would by itself be a proper basis for setting aside the conviction in this case, the courts should examine into the facts relating both to the events preceding Cantellops' recantation and to Cantellops' repudiation of his recantation. For examination of such facts, the appropriate tribunal would be the dis-

[6] For the Court's information: In a letter to counsel dated April 26, 1960, replying to counsel's letter dated March 23, 1960, the Solicitor General has stated that Cantellops' recantation "has been the subject of an extensive investigation. It is our belief that the recantation, which has been repudiated by Cantellops himself, was entirely false and was procured through duress or bribery".

trict court in the first instance, as the Solicitor General has indicated.

On the other hand, it is submitted that the independent new evidence in refutation of important segments of Cantellops' trial testimony does constitute a proper basis for this Court to vacate the conviction, without requiring the matter to be first examined by the district court. The information contained in the various items constitutes a forceful refutation of Cantellops' trial testimony concerning a most significant phase of the case—a refutation independent of any changes, or series of changes, which Cantellops might have made in his story.

The Brief in Opposition (page 55) does not analyze or comment on this independent new evidence, except to say by way of conclusion that the Solicitor General is satisfied "that the new materials do not warrant his consent to a motion for a new trial."[7]

The significance of these items, which are independent of Cantellops' recantation, has been summarized at pages D-6 through D-19 and D-35 through D-57 of the Petition, to which reference is made. As is there set forth, the record of this case clearly establishes that at the trial the Las Vegas matter occupied a role of great importance. If Cantellops lied at the trial in his testimony concerning the Las Vegas matter, then this

[7] For the Court's information: In the letter to counsel dated April 26, 1960 (see note 6, *supra*) the Solicitor General has stated: "The alleged discrepancies in the Cantellops' testimony regarding the Las Vegas trip, to which I do not in any event attribute great significance, can for the most part be satisfactorily explained. That explanation will be forthcoming when the matter is properly presented for determination by a motion for a new trial under Rule 33 of the Criminal Rules."

Court should take "the earliest opportunity" to set aside the conviction. *Mesarosh* v. *United States*, 352 U.S. 1, 14.

According to Cantellops' trial testimony, his March 1955 trip to Las Vegas and the events immediately preceding it marked his own entrance into the alleged narcotics conspiracy and led to the various other activities which he claimed he carried on subsequently on behalf of the alleged conspiracy. Moreover, Las Vegas was the one trip away from New York—among all those Cantellops claimed to have made—for which there existed solid documentary evidence that Cantellops at least had actually been physically in the city he claimed to have gone to, Las Vegas, at the time when he claimed to have been there on behalf of the alleged narcotics conspiracy. Accordingly, at the trial the prosecution used the Las Vegas matter in a vigorous effort to establish plausibility for Cantellops' whole trial testimony. Likewise, considerable time at the trial was spent cross-examining Cantellops, seeking to get at the real facts as to the circumstances under which Cantellops had gone to Las Vegas, the length of time he was there, and what he did while he was there, the location of the rooming house where he stayed, his financial situation at the time, and the circumstances under which and person with whom he left Las Vegas and returned to New York.

According to the information in the items furnished, it now would appear that Cantellops' trial testimony concerning these matters was filled with falsehoods. For a more detailed analysis of the refutation, reference is made to the portions of Appendix D to the Petition just cited. As is summarized at pages D-17 and D-18, according to the information in the items

furnished, it is clear that during the portion of March 1955 which immediately preceded his leaving New York for Las Vegas, there were numerous events in Cantellops' life—some of them documented by official court records—having an entirely different nature from the activities which he described at the trial; and throughout the entire trial, these activities were neither disclosed nor hinted at. More than that, according to the information in the items furnished, Cantellops' trial testimony concerning the important Las Vegas matter was fundamentally false in a number of respects; the independent refutation in the items furnished now shows that Cantellops was in Las Vegas for a period far exceeding the period he repeatedly testified to at the trial; and that, contrary to his trial testimony to the effect that he had money when he was in Las Vegas and also when he left Las Vegas and came back to New York, Cantellops actually was "broke" and unable even to pay his very modest room rent at the rooming house. Further, Cantellops in his trial testimony told a very elaborate story about how he met a complete stranger at the Golden Nugget in Las Vegas with whom he shared expenses on a drive back to New York; and according to the information in the items furnished, that story was fundamentally false, and Cantellops was found at the rooming house in Las Vegas by Linares, whom he knew perfectly well, and Linares (together with Stella) then brought Cantellops back to New York.

In addition, according to the information in the items furnished, it appears that a considerable amount of this refuting information concerning Cantellops' stay in Las Vegas had been made available before the trial to the Federal Bureau of Narcotics, in response to in-

quiries and requests for documents which the Bureau of Narcotics had made as a part of its official investigation. Such information clearly stood in refutation of important segments of Cantellops' trial testimony and would have shattered Cantellops' credibility if disclosed at the trial. Yet no hint was given at the trial that any such information existed.

On the basis of the record in this case it is submitted that the information in the items furnished cannot, with reason, be considered as uncovering mere "discrepancies" (see note 7, *supra*) in Cantellops' trial testimony. The record in this case shows unmistakeably that this was a most vital part of the trial, and that false testimony by Cantellops on these matters should require in justice that the conviction be set aside by this Court. *Mesarosh* v. *United States*, *supra*, 352 U.S. at 13-14. Indeed, in the present trial this testimony by Cantellops had a far greater impact, and played a far more important role, than could be said in the *Mesarosh* case concerning the testimony of the discredited witness Mazzei, which there led this Court to set aside the conviction. Comparable action should be taken here.

## CONCLUSION

For the various reasons set forth in the Petition and in this Reply, the Petition for Certiorari should be granted; the judgment of conviction should be reversed; because of the insufficiency of the evidence, a judgment of acquittal should be directed to be entered;

and the Court should order such other action as may be just under the circumstances.

Respectfully submitted,

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